

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
2 STATE OF WASHINGTON

3 THERMAL REDUCTION, INC.,)
4 Appellant,) PCHB No. 89-18
5 v.)
6 NORTHWEST AIR POLLUTION CONTROL) ORDER GRANTING
7 AUTHORITY and SAFE WASTE) SUMMARY JUDGMENT
MANAGEMENT NOW,) TO APPELLANT
 Respondents.)

9
10 Procedural Background

11 On February 21, 1989, Appellant Thermal Reduction Company, Inc.
12 ("TRC") filed a Motion, Memorandum and Exhibit in Support of Summary
13 Judgment. The Board issues its ruling based also upon the following:

- 14 1. Appellant's filings in Support of Temporary Restraining
15 Order, sworn testimony and argument heard on February 15, 1989.
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1 2. The parties and (then) amicus Safe Waste Management Now's
2 ("SWMN") filings on Stay, sworn testimony and argument heard on
3 February 24, 1989;

4 3. a. Respondent Northwest Air Pollution Control Authority's
5 ("NWAPA") and (now) respondent SWMN's filings opposing
6 Summary Judgement;

7 b. Appellant's rebuttal filings on Summary Judgment;

8 c. The parties' letters with citations; and

9 d. Counsel's arguments heard on March 28, 1989.

10 TRC was represented by Attorney Thomas H. Wolfendale of Preston,
11 Thorgrimson, (Seattle). Respondent NWAPA was represented by Attorney
12 William H. Neilsen of McIntosh, Lewis (Mt. Vernon).

13 Respondent-Intervenor SWMN was represented by Attorney Loren Dunn of
14 Riddell, Williams (Seattle).

15 A Temporary Restraining Order was orally announced, allowing TRC
16 to burn up to 5 tons average per calendar day of medical wastes,
17 confirmed by written Order dated February 17, 1989.

18 A Stay Order was orally announced on March 1, 1989 with the same
19 5 ton limit, based on likelihood of success on the merits.

20 Having considered the foregoing filings, testimony and argument,
21 and being fully advised, the Board issues the following Order on
22 Summary Judgment:

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27 ORDER GRANTING SUMMARY
 JUDGMENT TO APPELLANT
 PCHB No. 89-18

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After a noticed hearing, on November 15, 1988, NWAPA issued an Order to TRC which included a condition that limited hospital waste burning at the Bellingham area incinerator to two (2) tons per day calculated on a calendar monthly average. (NWAPA views the burning of medical wastes as related to emissions of hydrogen chloride.) TRC appealed that Order, which appeal became PCHB No. 88-183. That NWAPA Order was automatically stayed under the then-existing NWAPA regulations.

The NWAPA Order under dispute in this appeal, PCHB No. 89-18, was issued on January 13, 1989, by letter to TRC. It states:

On January 11, 1989, the Northwest Air Pollution Authority Board of Directors conducted their regular monthly meeting. By motion, the Board unanimously approved the following.

Thermal Reduction Company shall be limited to two (2) tons medical waste per calendar day. This amount of medical waste is the upper limit that Thermal Reduction Company shall burn.

The above Regulatory Order is issued pursuant to NWAPA Regulation 121 and RCW 70.94.221. The two ton limit is defined as a daily average for a calendar month. The effective date of the order shall be February 1, 1989.

1 This Order was not automatically stayed, because NWAPA had
2 changed its regulations. As a result, TRC filed Motions for a
3 Temporary Restraining Order and for a Stay. As noted, the Board
4 granted these motions, but limited hospital waste burning to 5 tons
5 average per calendar day.

6 A Motion to Consolidate PCHB No. 88-183 with PCHB No. 89-18 was
7 filed on March 6, 1989. Appellant is opposed to consolidation. The
8 decision on consolidation was deferred until after a Board decision on
9 Summary Judgment in PCHB 89-18.

10 III

11 TRC is a private company which operates an incinerator in
12 Ferndale, Washington, Whatcom County, near the City of Bellingham.
13 TRC's incinerator burns municipal solid waste and medical waste. The
14 TRC facility was issued a variance permit on December 9, 1987. When
15 the variance was issued, TRC was burning an average of 2 tons daily of
16 medical waste. There were no limitations whatsoever in the variance
17 permit on the amount of medical wastes that could be burned.
18 Moreover, it imposed no limits on emissions of hydrogen chloride. The
19 variance has an expiration date of December 31, 1991.

20 In October 1988, TRC burned a daily average of 3.98 tons of
21 medical waste. In November and December 1988 they burned 3.9 and 5.0
22 tons of such waste.

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The Northwest Air Pollution Control Authority is an activated air pollution control authority under the terms of the State of Washington Clean Air Act, Chpt. 70.94 RCW, responsible for enforcing the provisions of the Act. A copy of its current Regulations (including the Amendment on Stay) have been filed.

The Board takes official notice of the NWAPA Regulations (As Amended).

V

NWAPA did not provide advance notice to TRC that the January 1989 Board meeting would hear testimony and consider adopting an Order imposing limitations on the TRC incinerator. A TRC representative was present at the open NWAPA meeting. The attorney for SWMN was present. During the portion of the hearing set aside for "Petitions from the Public", SWMN requested action on TRC's incinerator. Testimony was heard. TRC did not present testimony. As a result, the NWAPA Board issued this Order.

CONCLUSIONS OF LAW

I

The NWAPA order on its face states that it was issued pursuant to NWAPA Regulation 121. Section 121 provides for the issuance of orders for corrective action "if the Board or control officer has reason to believe that any provision of this regulation has been violated. . . . "

1 This section is closely modeled upon and apparently intended to
2 implement RCW 70.94.211 of the State Clean Air Act. This statutory
3 section itself imposes requirements on the content of the notice which
4 must be given in connection with such a "violation order". The notice
5 shall:

6 specify the provision of this chapter or the ordinance,
7 resolution, rule or regulation alleged to be violated
8 and the facts alleged to constitute a violation thereof
 [. . .].

9 Thus, the Legislature provided for a form of statutory due process in
10 the imposition of notices of violation and accompanying orders to take
11 corrective action.

12 II

13 The order in question fails to conform with the statutory
14 requirements for such a "violation order". The provision of law
15 alleged to be violated is not identified. The facts alleged to
16 constitute a violation are not set forth.

17 III

18 NWAPA, however, argues that notwithstanding what the order states
19 on its face, it is in reality an order issued pursuant to RCW
20 70.94.141(3). The assertion that RCW 70.94.141(3) supports the order
21 operates functionally like an amendment of pleadings. Thermal has,
22 thereby, been given notice of this shifting of the ground of the basis
23 for the agency's action and has, in connection with the instant
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1 motion, been given an opportunity to litigate the matter before this
2 Board.

3 The situation is, thus, distinguishable from that in Marysville
4 v. PSAPCA, 104 Wn.2d 115, 702 P.2d 459 (1985) where the Board
5 improperly sustained a civil penalty on a basis neither raised in the
6 notice of penalty nor litigated by the parties. Cf. Wendle v. Farrow,
7 102 Wn.2d 380, 686 P.2d 480 (1984).

8 Accordingly, we conclude that NWAPA's explicit reference to
9 Regulation 121, followed by its failure to follow the statutory
10 requirements for "violation orders" is not fatal.

11 IV

12 NWAPA's present basis for its order, RCW 70.94.141(3), broadly
13 grants power to air pollution control authorities to:

14 Issue such orders as may be necessary to effectuate the
15 purposes of this chapter. . . .

16 The purpose of the chapter, as set forth in RCW 70.94.011 is to:

17 provide for a coordinated state-wide program of air
18 pollution prevention and control. . . .

19 The agency asserts that the limitation on the burning of medical
20 wastes is necessary for air pollution prevention and control and
21 therefore within the ambit of the "general order" authority of RCW
22 70.94.141(3). Nothing in the Clean Air Act specifies the form or
23 content of an order issued pursuant to that subsection.

The agency maintains that all it need do, beyond the bare issuance of the limitation imposed, is to demonstrate its factual basis at a hearing on the merits before this Board (i.e., that it is needed for air pollution prevention and control).

V

This argument by NWAPA overlooks one critical fact. TRC is the holder of a valid air pollution variance which permits the incinerator to operate free of any hydrogen chloride limitations.^{1/} The Order at issue intrudes on this legal scheme and modifies it.

The issuance of a variance is, in part, the creation of standards applicable to a particular source. It follows, then, that an order which effectively modifies the terms of a variance is likewise an act of standard setting and should be subject to the same procedural requirements as were called for in the granting of the variance initially.

A variance can be issued only "after public hearing or due notice". RCW 70.94.181(1). We believe this means that variance decisions cannot be made until affected persons have been informed of the action contemplated and given a reasonable opportunity to prepare and present views to the decision makers. See generally, Glaspey v. Conrad, 83 Wn.2d 707, P.2d (1974); Barrie v. Kitsap County, 84 Wn.2d 579, 527 P.2d 1377 (1974).

1/ This remains true so long as the automatic stay of the variance revision of November 15, 1988, remains in effect in PCHB No. 88-183

We conclude that an order which modifies a variance cannot validly be issued until such procedural steps are followed. We hold, as a matter of law, that the process which preceded the issuance of the instant order on January 15, 1989 did not comport with such minimal procedural requirements.

VI

In so ruling, we find unpersuasive SWMN's argument that the November 1988 NWAPA hearing on PCHB No. 88-183 somehow constituted notice to TRC for the January-issued order.

VII

We vacate this order purely on procedural grounds. We, therefore, need not and do not address the other issues raised.

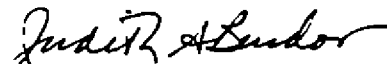
We decline to address any constitutional issues raised.

ORDER

The NWAPA order issued to TRC on January 13, 1989 is VACATED.

SO ORDERED this 5th day of May, 1989.

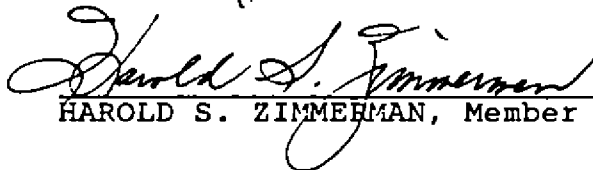
POLLUTION CONTROL HEARINGS BOARD



JUDITH A. BENDOR, Presiding



WICK DUFFORD, Chairman



HAROLD S. ZIMMERMAN, Member